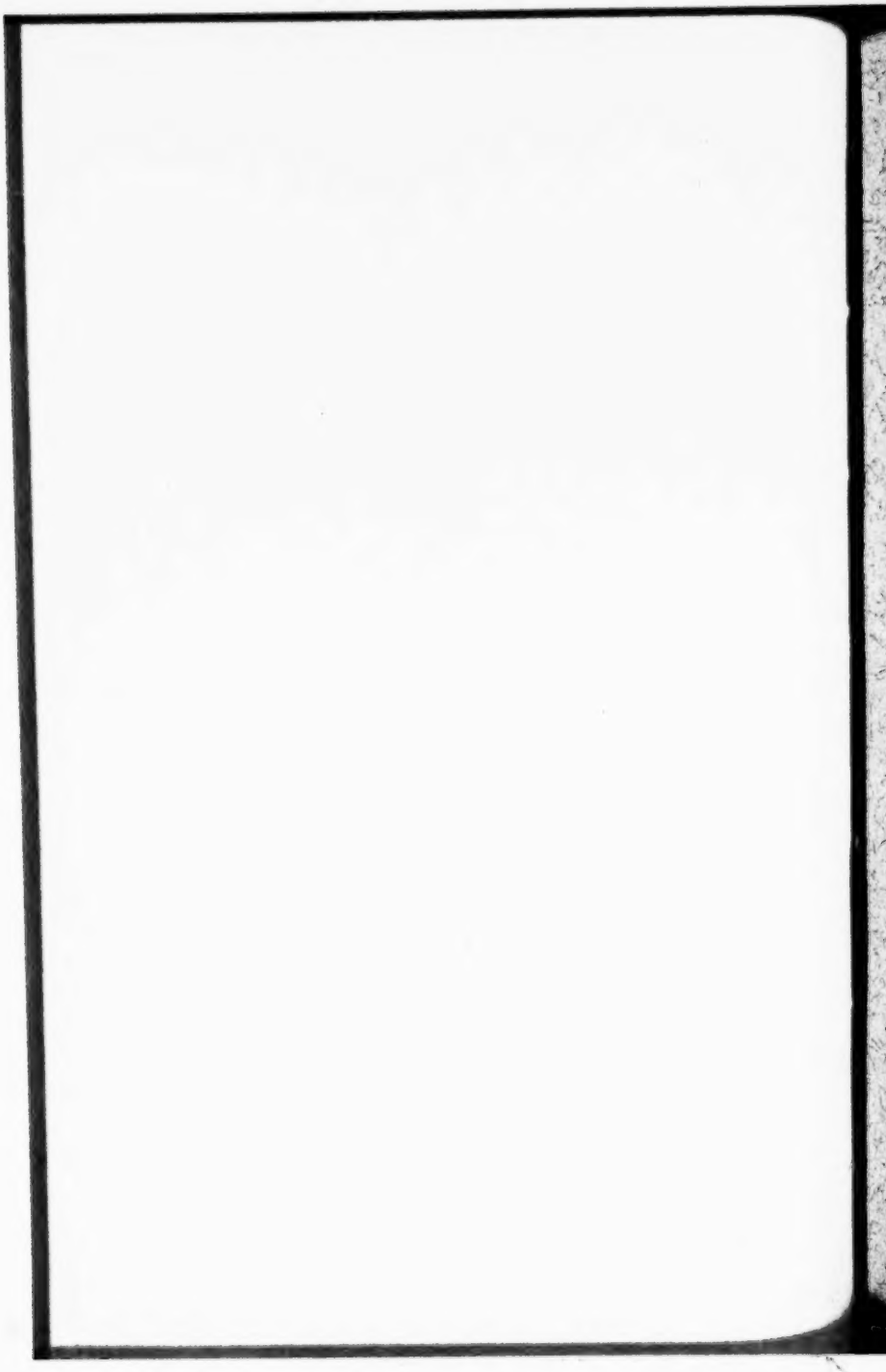


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# In the Supreme Court of the United States

OCTOBER TERM, 1952.

## No. 323.

CARL R. BALDUF, RAYMOND P. GREENE and JOANNE J. GREENE,

*Petitioners,*

vs.

OHIO TURNPIKE COMMISSION and ARCHIBALD J. ALLEN, SECRETARY-TREASURER OF THE OHIO TURNPIKE COMMISSION,

*Respondents.*

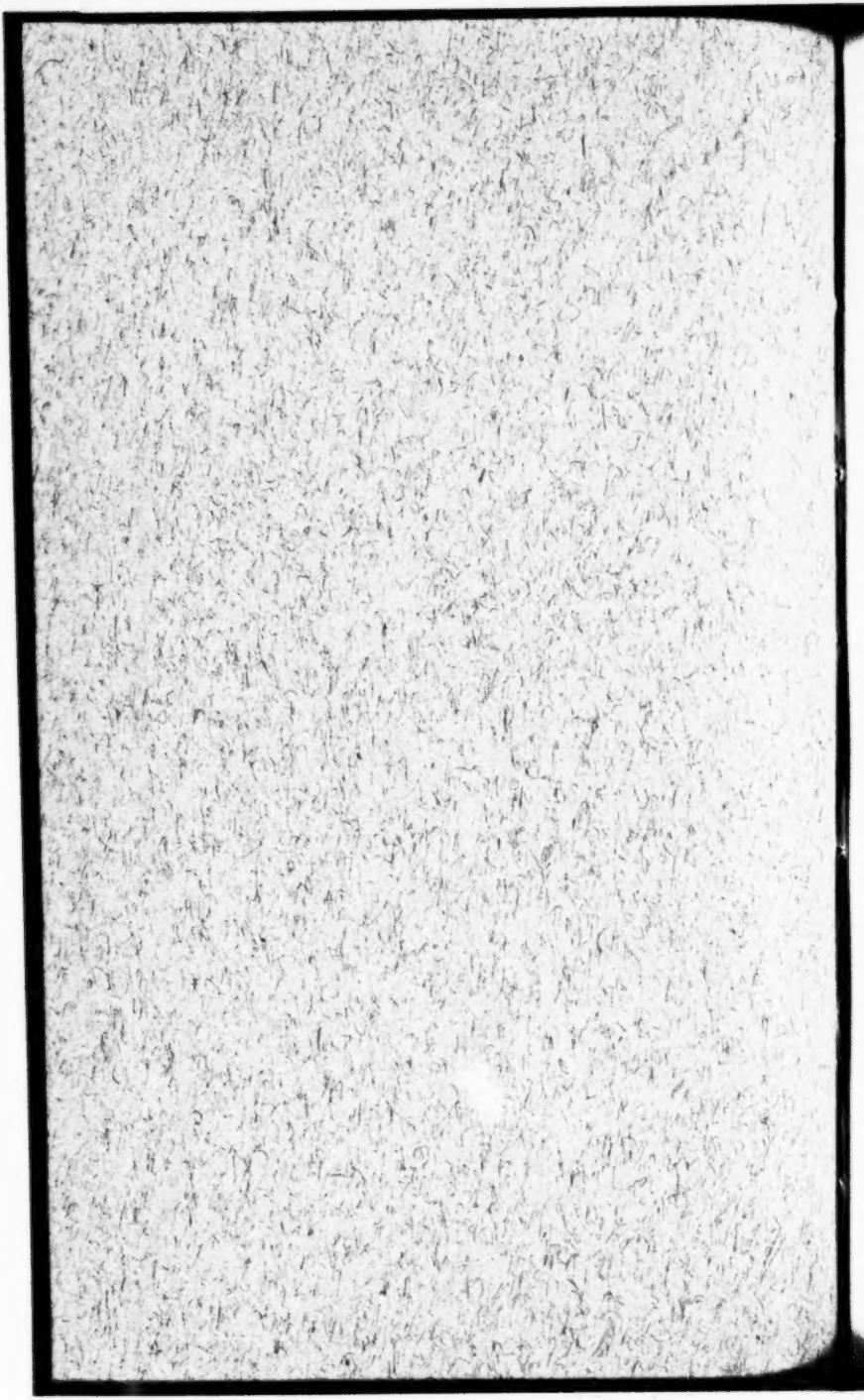
## BRIEF FOR OHIO TURNPIKE COMMISSION OPPOSING CERTIORARI.

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## No. 323.

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vs.

OHIO TURNPIKE COMMISSION and ARCHIBALD J. ALLEN, SECRETARY-TREASURER OF THE OHIO TURNPIKE COMMISSION,

*Respondents.*

## BRIEF FOR OHIO TURNPIKE COMMISSION OPPOSING CERTIORARI.

### Essence of Commission's Response.

The respondent, Ohio Turnpike Commission, maintains that the petition for writ of certiorari does not present any federal question of substance and that the cause has become moot.

### Statement of the Case; No Opinion Rendered Below On Ruling From Which Petitioners Appeal.

The Commission as Relator on June 4, 1952 sought a writ of mandamus against its Secretary-Treasurer, also a respondent herein, from the Supreme Court of Ohio to compel said officer to seal, attest and deliver a Trust

Agreement and $326,000,000 of Turnpike Revenue Bonds to pay the cost of Turnpike Project No. 1 in Ohio. (R. 13.)

The Secretary-Treasurer filed his answer on June 5, 1952. (R. 133.) Relator demurred to the answer on the ground "that it does not state a defense." (R. 173.)

Petitioners herein moved the Ohio Supreme Court on June 9, 1952 for leave to intervene, become respondents and file answers. (R. 173.) Their motion was overruled on June 10, 1952,* but they were then given leave to file a brief *Amicus Curiae*. This they did on June 18, 1952. (R. 2 and petition here, p. 4.)

No opinion was rendered in denying the petitioners' motion or application for reconsideration, but on July 9, 1952 the Ohio Supreme Court sustained relator's demurrer and allowed the requested writ of mandamus, supporting the same with an opinion which is printed in the Record at pages 4 to 13 and is published in Ohio Bar dated July 14, 1952 and is to be 158 Oh. St. 168 and 107 N. E. 2d 345.

**Questions Presented and Summary of Argument.**

Petitioners seek to have this Court review the orders of the Supreme Court of Ohio, which denied them leave to intervene in said mandamus proceeding. They invoke the court's jurisdiction under 28 U. S. C., sec. 1257 (3) which authorizes the court to review final judgments of state courts of last resort by writ of certiorari when any proper right is specially claimed under the Constitution or statutes of the United States.

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* Petitioners applied on June 12, 1952 to the Ohio Supreme Court for reconsideration of their motion and this was refused on July 9, 1952.

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This Court's Rule 38 (5a) is that a review on writ of certiorari "will be granted only where there are special and important reasons therefor" such as—

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The petitioners' brief concludes as to the "questions presented"—

> "* * * the only question is as follows: 'Did the Supreme Court of the State of Ohio deprive these petitioners of their constitutional rights by overruling the motion filed in the mandamus action before said Court?' " (Their brief, p. 7.)

That question, we argue, does not present any federal point of substance and has become moot. The questions are—

1. In a mandamus proceeding, in a state supreme court, not involving any fund, property, office or other right in which the petitioners have a proprietary interest, are petitioners denied a federal right by refusal of the state court to admit them as parties respondent when the decision will affect them only as a precedent, favorably or unfavorably?

2. After a state official has complied with a writ of mandamus of the state's highest court directing him to sign and deliver an agreement and revenue bonds, and the bonds have been sold to the investing public, is a question as to the right of third parties to intervene in the mandamus proceedings moot?

Petitioners sought to inject themselves into a mandamus proceeding by the Commission against its Secretary-Treasurer pending in a state court, Ohio's highest, al-

though their proposed answer* admits, indeed alleges, that "all of the constitutional questions raised in this mandamus proceeding are raised in the Common Pleas Court" actions they had pending in Lucas County, Ohio, that the actions in the Common Pleas Court "affords adequate remedy to all parties now before this Court," and that "trial of the factual issues giving rise to the constitutional issues and other factual issues, as alleged, cannot be had" in the mandamus proceeding. (Petitioners' brief, pp. 32 and 33.)

The ruling of the Supreme Court of Ohio rejecting the petitioners' effort to intervene in the mandamus case did not affect their right to proceed in the forum they had chosen and which they considered to be adequate and the only court appropriate to try the factual issues they wished to assert. The Ohio Supreme Court confined itself to *legal* questions and heard the petitioners as *Amicus Curiae* on the legal questions. They began their brief as *Amicus Curiae* by saying that "after careful study of the pleadings and briefs of Relator and Respondent herein"—

> "It is considered that the answer, and more especially the brief of the Respondent, Archibald J. Allen, well states the numerous issues set forth in such documents and these parties subscribe without reservation to the arguments advanced to this court by the Respondent."

How, then, could remittance of the petitioners to the state court that they considered competent to try the factual issues of their claims give rise to any federal question? When properly analyzed, the contention of the peti-

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* The proposed answer was not attached to petitioners' motion for leave to intervene and does not appear in the Record. It is represented by the petitioners that Exhibit A to their petition and brief (pp. 31-37) is a copy of their intended pleading.

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tioners here is only that the Supreme Court of Ohio erred in application of three sections of the state statutes (their petition and brief, pp. 5-6) regulating state court procedure and practice. [This was first made evident by petitioners' "Brief in Support of Motion to Intervene" which is in the Record here at pages 175 to 183.] But state courts of last resort do not err on such questions because their views thereon are conclusively right.* The petitioners were left with the privilege of trying their cases in the court of their choice and if necessary, of marching through the Ohio appellate courts and up to this Court on any federal question of substance.

Moreover, the question as to whether the petitioners should have been allowed to become parties in the mandamus case has become moot, just as that question never would have arisen if respondent Allen had ignored the rumors which caused doubts in his mind as to his legal duty and had sealed, attested and delivered the Trust Agreement and the bonds without hesitation. Mr. Allen, according to his affidavit filed with the Clerk and of which a true copy is appended to this brief, has complied completely with the mandate of the Supreme Court of Ohio as he was free to do and under compulsion to do. The petitioners had not sought or obtained any stay from the Ohio Supreme Court or from this Court, or any restraining order from the Court of Common Pleas for Lucas County (R. 239-247) or from any other court. The bonds are in the hands of the investing public for valuable consideration. Certiorari should be denied when a cause has thus become moot.

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* The rulings of the Ohio Supreme Court from which petitioners appeal will be shown hereinafter to have been in accord with well established practice in Ohio.

## ARGUMENT AND AUTHORITIES.

### NO FEDERAL QUESTION OF SUBSTANCE IS PRESENTED.

### Petitioners' References to Their Tax-paying Status is Immaterial.

The petitioners state that their actions pending in the Lucas County Common Pleas Court were "brought as property owners and taxpayers on behalf of the plaintiffs (themselves) and all other persons similarly situated"; that their class is of owners of property *not* in the path of the Turnpike and as to which they concede, under the law of Ohio, damage, if any,* is not compensable. (Petitioners' brief, pp. 16-17.)

Petitioners' motion for leave to intervene in the mandamus case was as individuals identified as plaintiffs in two actions pending in Lucas County. (R. 173-174.) The pleadings in the Lucas County cases attached to said motion (and the petition-brief herein at some places) recite as *descriptio personae* that the plaintiffs therein are taxpayers in the city of Maumee, county of Lucas and state of Ohio, but neither said motion nor the petition here attempts to maintain that petitioners were purporting to intervene on behalf of the state or Lucas County or Maumee.

The state was officially and actually represented by its Attorney General. (R. 1, 5.) No demand is alleged to have been made on the Prosecuting Attorney of Lucas County under any section of the General Code of Ohio as preliminary to suing on behalf of the county. Petitioners impliedly concede that their effort to intervene was not on behalf of the city of Maumee (their brief here, p. 6). *A fortiori,* no attempt is made to show that petitioners could,

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* Petitioners ask this court "to take judicial knowledge" that the proposed Turnpike running somewhere near their property will lessen its value!!!

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under the law of Ohio, speak for a city in asking leave to intervene in such a mandamus case or that any federal right of Ohio taxpayers would be violated if such a political creature of the state were denied recognition in a suit between other parties.

Incidentally, all of the salaries, expenses and costs of the Ohio Turnpike Commission and of constructing, operating and maintaining the Turnpike are paid or to be paid from the proceeds of the Turnpike Revenue Bonds or from tolls for using the Turnpike, and the bonds comply with requirement of the Trust Agreement that—

> "Section 1305. Nothing in the bonds or coupons or in this Agreement shall be construed as pledging either the faith and credit or the taxing power of the state of Ohio or any political subdivision thereof for their payment, or to create any debt against said State or any political subdivision thereof." (R. 130; 47, 53.)

Moreover, this Court does not review efforts of "a citizen and taxpayer" to invalidate a state law which does not result in any direct pecuniary injury to him differing from the effect upon people generally. *Doremus v. Board of Education,* 342 U. S. 429 (1952); *Frothingham v. Mellon,* 262 U. S. 447, 487-8 (1923). This could never be in the case at bar since no property of the petitioners was involved; the bonds are merely revenue bonds and no action under the law would or could affect petitioners' taxes, *a fortiori,* no action would or could affect them peculiarly. Opinions are quite unanimously against any common law right of citizens and taxpayers to interfere with the use of state funds not raised by taxation. 131 *A. L. R.* 1230.

In such cases, only the Attorney General can speak for the State of Ohio, section 333 O. G. C., and he did so in the court below; otherwise there might be conflict between the policy and strategy of the official representative

of the state and of the public spirited taxpayer. There is no statutory right in Ohio for taxpayers to sue on behalf of the state; more especially, no statutory right to *defend* mandamus cases, as there is for taxpayers to maintain some types of claims on behalf of counties and municipal corporations. Thus the petitioners were in less favorable position than the taxpayer who sought to intervene in *Cincinnati v. Kellogg*, 153 O. S. 291, for which the syllabus by the Court is:

> "Where the solicitor of a municipal corporation has instituted a suit for an injunction under the provisions of Section 4311, General Code, at the request of a taxpayer, and the trial court finds that the solicitor is proceeding in good faith and with due diligence, the court is not in error in refusing to allow the taxpayer to become a party to the action."

As the city did not try to become a party in the mandamus proceedings and is not petitioning for any review by this Court, the complaint by the petitioners that the Ohio Supreme Court, on its own order, should have made the City of Maumee a party to the mandamus proceedings (petitioners' brief, pp. 6 and 7) will be ignored hereinafter.

**No Property Rights of Petitioners Were to be Adjudicated or Prejudiced in the Mandamus Proceeding and Petitioners Were Not Necessary Parties to the Issues of the Case.**

As "Reasons Relied On For Allowance Of The Writ," the petitioners confine themselves (their brief, pages 8 to the end) to expounding sections 11255 and 11262 of the Ohio General Code, to criticism of the Supreme Court of Ohio for entertaining a suit by the Turnpike Commission against its Secretary-Treasurer, and to non-sequitur as-

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sertions that alleged errors of the Ohio Supreme Court in applying the state statutes, by denying them the position of parties respondent in the mandamus case, deprived them of property without a hearing and denied them the equal protection of the laws.

Petitioners do not enlighten us an iota as to the property right or interest that they had in the subject matter of the litigation between the parties to the mandamus case and of which they were deprived without notice and hearing. The facts that the mandate was executed and the bonds marketed illustrates conclusively that the petitioners' presence in the Ohio Supreme Court was not essential to complete determination and settlement of the questions involved therein. Whatever real rights they had by virtue of owning property somewhere near the proposed (but changeable, R. 101) route was saved to them through maintenance and prosecution of their Lucas County actions or such other remedies as might be advised. Any prejudice to their legal theories, as distinguished from "interest" and "rights" to which sections 11255 and 11262, O. G. C., refer, would not operate in respect to any federal question to which this Court confines itself.

The petitioners' bitter tears are that if their Lucas County cases reach the Supreme Court of Ohio for review, they will be confronted with views expressed by the court when they had been heard only as *Amicus Curiae*. But petitioners concede that the Ohio Supreme Court did not, in the mandamus case, decide any question arising under the Constitution of the United States that is presented in their Lucas County cases (their brief here, p. 18). As far as Ohio state law is concerned, every case involves legal principles that the lawyers for the parties in the case had no part in forming, some of the principles dating back to Blackstone and Coke. No wonder "The Petitioners submit

that they are unable to find authorities, whether in Ohio or elsewhere, directly in point on this matter * * *" (their brief here, p. 18) of an alleged right to become a party in a case merely because the applicant is interested in the legal principles that may be announced. Ohio has several million property owners and taxpayers who might qualify as intervenors in most cases if the petitioners' contentions had merit.

The contention (in their brief, pp. 24-27) that petitioners were denied equal protection of the laws because respondent Allen was permitted to challenge the constitutionality of the Turnpike Act whereas petitioners were not permitted to become parties in the case must be one of the new ideas for which petitioners could not find authority. Whether a state court should act or decline to act in "a friendly suit" to command "the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station" (Section 12283, General Code of Ohio) while remitting those other than the official respondents, who would like to prevent such official action, to other courts or a separate case in their own asserted right is not a federal question. They are not denied the equal protection of the laws as they are not in the same classification and position as the reluctant official. However non-belligerent the Secretary-Treasurer may have been, the petitioners complimented his answer and brief in the mandamus case and do not criticise the independence, competency, industry or vigor of the law firm that represented him, and petitioners were heard *Amicus Curiae*.

The mandamus proceeding was to determine the official duty of respondent Allen. (Section 12283, O. G. C.) Ohio's General Code chapter on Mandamus provides

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for service of process only upon the delinquent official or officials (Sections 12286, 12289, 12291), and for pleadings only by such respondent or respondents (Section 12292). There is no reference incorporating section 11255 or 11262 upon which the petitioners rely. It is only with respect to pleadings, trial and review that code provisions elsewhere are incorporated by reference. Section 12295 is:

> "12295. Pleadings. The pleadings shall have the same effect, must be construed, may be amended, and issues of fact made by them must be tried, and further proceedings thereon had, in the same manner as in civil actions."

The relator in the mandamus case was not seeking an order affecting any fund, property, office or other right in which the petitioners had any proprietary interest.

*State ex rel. Donsante v. Pethtel,* 158 O. S. 35 (1952), was an action to compel county officials to reinstate certain special assessments on the tax list. Property owners, whose lands would have been directly affected by this special assessment, intervened and attempted to establish the defenses of laches and estoppel. A pertinent sentence in the opinion of the court is:

> "This is an action only to compel public officials to perform their official duties, and it is not necessary to make third persons parties defendant, although they may be affected by the order." (p. 41.)

In *State, ex rel. City of Dayton v. Patterson,* 93 O. S. 25 (1915), the city sought to compel the Budget Commissioners of Montgomery County to reduce each public agency's budget ratably rather than to exercise discretion in reducing the total budget to the ten mill maximum. The court said:

> "It is suggested by counsel for the defendants that in this matter the rights of the board of education had

become fixed and that it was a necessary party to this proceeding. * * * A proceeding in mandamus is statutory and the only order that can be made is against the defendant, commanding the performance of an act which the law enjoins as a duty resulting from the office, trust or station. Such an order, in many cases, may affect many persons. But it is certainly unnecessary to make such persons parties to the proceeding." (p. 36.)

*Cincinnati College v. Yeatman,* 30 O. S. 276 (1876), was a mandamus action by a lessor to compel the auditor of Hamilton County to transfer certain property on the tax duplicates to the lessee's name. Evidently the auditor argued that the lessee was a necessary party but the court dismissed this contention by stating:

"Neither do we think that the association is a necessary party, nor that mandamus is not the proper remedy.

"The association is not concluded by these proceedings. As between the relator, in whose name the entire property is taxed, and the auditor, the question is one of the non-performance of official duty.

"The relator has the statutory right to be relieved from the payment of taxes on property it does not own and has conveyed to another, whether it is charged to the association or not." (p. 287.)

It is also the rule in federal court proceedings that persons who are only interested collaterally are not entitled to intervene and defend a mandamus case. *Normandy Beach Development Co. v. U. S. ex rel. Brown-Crummer Inv. Co.*, 69 F. 2d 105 (5 C. C. A., 1934).

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**Ohio Supreme Court's Decision That Ohio's Statutes Did Not Entitle the Petitioners to Intervene in the Mandamus Case Is Conclusive; a Contrary Opinion by Petitioners Cannot Create a Federal Question.**

Whether the petitioners should be allowed to intervene in the mandamus case or be left to protection of their rights through prosecution of their Lucas County cases or some other action in a court of original jurisdiction is a matter of Ohio state procedure.

In the case of *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1898), the matter was considered too well settled to be even argued:

> "It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the Supreme Court of the State upon its own constitution and statutes as correct." (p. 566.)

The rule is well expressed in *Snyder v. Massachusetts*, 291 U. S. 97 (1934), in which the court said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105.)

The conclusiveness of a state's determination in matters of procedure applies to questions of proper and necessary parties. In *City of Boston v. Jackson*, 260 U. S. 309 (1922), the rule is stated as follows:

> "The motion to dismiss is urged first upon the ground that Charles L. Burrill as Treasurer and Receiver General was the defendant in the original bill and that the present defendant Jackson, his successor in office, has been substituted without legal sanction. The

substitution took place in the Supreme Judicial Court of Massachusetts before that court considered the case on its merits and in the court's opinion the objection to the substitution was noted and overruled. This settles conclusively so far as we are concerned, that the state law authorized the substitution." (p. 313.)

In the case of *McCaughey v. Lyall*, 224 U. S. 558 (1912), the heirs' contention was that as land passed to them on the death of the intestate they had to be made parties in an action of foreclosure against the administrator. The California Supreme Court held otherwise. The United States Supreme Court dismissed the argument summarily by stating:

"The Supreme Court of the State in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. (The decisions are cited.) This is conceded by plaintiffs in error, but they say that because § 1582 of the Code of Civil Procedure 'is made the basis of the rule established by the Supreme Court of the State' they complain of it, and respectfully urge that it 'is repugnant to the Fourteenth Amendment of the Constitution of the United States, § 1.' This is equivalent to saying that the legislative power of the State, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the Supreme Court of the State cannot construe the laws of the State and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary." (p. 563.)

The rule is expressed in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930), cited by petitioners, as follows:

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"It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the State; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrine established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." (p. 680.)

"Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to re-examine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review." (p. 681.)

*Cohen v. Beneficial Loan Corp.*, 337 U. S. 541 (1948). New Jersey by statute required a shareholder suing on behalf of a corporation to furnish security for attorneys fees unless holding a specified minimum number of shares. It was held that the statute does not deny due process or equal protection. "A state may set the terms on which it will permit litigations in its courts." (p. 552.)

When, as in the instant case, there are state grounds broad enough to sustain the denial of petitioners' motion for leave to intervene, this Court customarily does not take jurisdiction. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303-4 (1917); *Klinger v. Missouri*, 80 U. S. 257, 263 (1871); *Johnson v. Risk*, 137 U. S. 300, 307 (1890); *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54 (1934); *White v. Ragen*, 324 U. S. 760, 766-7 (1945); *Woods v. Nierstheimer*, 328 U. S. 211, 216-7 (1946).

**Denial of Leave to Intervene Was Not a Final Judgment.**

Since the denial of leave to intervene was by the highest Court of Ohio on an adequate "state" ground, it is quite immaterial whether such order was a final judgment within the meaning of 28 U. S. C. Section 1257 (3).

However, since there were and are other forums and means for protection of all real rights of the petitioners, the rulings on their motion for leave to intervene were not "final" in an appealable sense.

The petitioners concede that "An order denying permissive intervention is final only if the applicant for intervention has no other adequate means of asserting his rights," (their brief, p. 27). They do not gain even the first round in a ladder leading to the conclusion that other courts and means were not available. Indeed, as aforesaid, they concede that their Lucas County cases were adequate. But they urge that denial of leave to intervene as of right is final and reviewable. However, they predicate their "right" upon a construction of an Ohio statute to which construction the Supreme Court of Ohio did not subscribe. Thus their absolute "right" evaporates and even if the Ohio Supreme Court erred according to the opinions of other lawyers and judges, no federal question would be presented. The writ in the mandamus case did not purport to dispose of the Lucas County cases or any property rights of the petitioners, or to cut off access to any court of original jurisdiction over the claims of the petitioners. What is or is not a "final judgment" for purposes of appeal within the same judicial hierarchy is, therefore, of little or no consequence when the existence of the right depends upon the construction of a state statute and the highest court of the state acts in denial of the existence of such right.

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In *Credits Commutation Co. v. U. S.*, 177 U. S. 311 (1900), certain lien creditors obtained appointment of receivers for the Union Pacific. Trustees of the first mortgage filed a complaint to foreclose the mortgage. The United States filed a complaint to foreclose its subsidy lien. Credits Commutation Company and another corporation applied in each of the three cases for leave to intervene in order "to assert certain alleged rights and interests." Leave was denied, appeal to the Circuit Court of Appeals was allowed, motion to dismiss that appeal was sustained and appeal to the Supreme Court allowed. This court held as is stated in the headnote:

> "When leave to intervene in an equity case is asked and refused, the order denying leave is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding.
>
> "The action of the court below, in denying the petitions to intervene, was an exercise of purely discretionary power, and was not final in its character."

These principles were followed in *Ex Parte Leaf Tobacco Board*, 222 U. S. 578 (1911); *Sutphen Estates, Inc. v. U. S.*, 342 U. S. 19 (1951); *Lupfer v. Carlton*, 64 F. 2d 272 (5 C. C. A., 1933), and *Mackey v. City of Little Rock*, 94 F. 2d 546 (8 C. C. A., 1938, c.d. 304 U. S. 582), a case in which a taxpayer sought and was denied leave to intervene in a case removed from state to federal court.

**THE CAUSE HAS BECOME MOOT.**

The Record, pages 2-3, shows that the Supreme Court of Ohio granted the Commission's prayer, allowed a writ of mandamus commanding its Secretary-Treasurer, respondent Allen, to seal, attest and deliver the Trust Agreement and the bonds and that the writ was served. An affi-

davit by Mr. Allen, filed with the Clerk and printed as an appendix to this brief,* brings to the Court's attention the fact that the mandate was executed on the twentieth day and after much publicity, there being no stay or restraining order. A failure by respondent Allen to comply would have placed him in contempt of Ohio's highest court. Pursuant to the writ and the Trust Agreement, an unusually large sum has been realized from a great number of bonds distributed to the public. This renders the cause moot. Reversal of the denial of leave to petitioners to intervene could not restore the Secretary-Treasurer to his former position in relation to financing for the project.

In *Codlin v. Kohlhausen,* 181 U. S. 151 (1901), a territorial court of New Mexico granted a writ of mandamus commanding officers of a Board of County Commissioners to sign and deliver for sale bonds to finance construction of a courthouse. This was done and so an appeal to this Court was dismissed on the ground that the cause had become moot under the rule applied in *Mills v. Green,* 159 U. S. 651, 653 (1895).

In *United States ex rel. Norwegian Nitrogen Products Company v. United States Tariff Commission,* 274 U. S. 106 (1927), two paragraphs of the headnote are:

> "4. In the absence of an injunction or restraining order, an administrative body, after judgment in its favor in an action to control its conduct by mandamus, may proceed to dispose of the matter before it notwithstanding the pendency of a writ of error to the judgment. P. 111.
>
> "5. A case becoming moot pending review should be remanded with directions to dismiss. P. 112."

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* This is acceptable practice according to page 503 of *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States,* as revised (1951) by Wolfson and Kurland.

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In *Brownlow v. Schwartz,* 261 U. S. 216 (1923), a mandamus proceeding was brought in the Supreme Court of the District of Columbia to compel the issuance of a building permit. The trial court denied the writ, but on appeal the Court of Appeals reversed and ordered issuance. An appeal was taken to the Supreme Court, but while it was pending a clerk believing that the Court of Appeals decision was binding, issued the permit, and the building was erected before the case was heard by the Supreme Court. The relator had also disposed of her interest prior to the hearing. The court said:

> "It thus appears that there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide. The case has become moot for two reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.
>
> "This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. *A reversal would ostensibly avoid an event which had already passed beyond recall.* One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain. * * *." (pp. 217-8; emphasis added.)

*Doremus v. Board of Education, supra,* 342 U. S. 429 (1952), is a late case to the foregoing effect.

## CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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## APPENDIX.

**Affidavit to Evidence that the Cause Has Become Moot.**

STATE OF OHIO,
COUNTY OF FRANKLIN, SS:

Archibald J. Allen, one of the respondents in the above entitled cause, being first duly sworn according to law deposes as follows:

1. Affiant resides at Cincinnati, Ohio, and is Secretary-Treasurer of the Ohio Turnpike Commission, the other respondent.

2. As the record for the petition in the above entitled cause shows, the petition is for a writ of certiorari to the Supreme Court of Ohio for review of the decision and record of the Supreme Court of Ohio upon a petition for a writ of mandamus, filed in said court on June 4, 1952 as case numbered 33129 upon the docket of said court, wherein the Ohio Turnpike Commission as relator in the name of the State of Ohio sought a writ of mandamus to affiant. The proceedings in the Supreme Court of Ohio followed a resolution of said Ohio Turnpike Commission, a copy of which resolution was attached as Exhibit 1 to said petition for a writ of mandamus and was entitled:

> "A resolution determining the necessity of constructing Turnpike Project No. 1, authorizing the issuance of $326,000,000 of Turnpike Revenue Bonds, Project No. 1, of the State of Ohio and the execution and delivery of a trust agreement securing said bonds, and providing for the execution and delivery of temporary bonds." (Record in the captioned cause, page 20.)

The petition for said writ of mandamus alleged (R., pp. 19-20):

> "14. All necessary steps have been taken preliminary to the performance by Respondent of his

legally imposed duty to affix the seal of Relator to said bonds and attest the same and to deliver said bonds to the Trustee for authentication and delivery, and to affix the seal of Relator to said Trust Agreement and attest the same but Respondent has refused and still refuses to perform any of such mandatory duties.

"15. Said proposal of Blyth & Co., Inc. and others accepted by Relator as alleged in paragraph 10 hereof requires the delivery of all of said temporary bonds not later than September 4, 1952, upon giving a notice prior thereto as provided in the proposal, unless such time is extended, as therein provided, by the purchaser. The market for such bonds is now exceptionally favorable and if by reason of delay or otherwise Relator is unable to make delivery in accordance with the terms of such proposal Relator believes, and therefore avers, that the terms of any bonds subsequently issued will not be as favorable as those in said proposal.

"16. The cost of materials and labor necessary for the construction of the turnpike is advancing and, it appears, will continue to advance so that any material delay in the issuance of said bonds will add substantially to the cost of the turnpike." (R., pp. 19-20.)

3. As appears upon pages 2 and 3 in the record for the pending petition in the Supreme Court of the United States, the Supreme Court of Ohio on July 9, 1952 made entry in said proceedings that—

"* * * it is, therefore ordered and adjudged that the writ of mandamus prayed for be, and the same hereby is, allowed and said respondent is hereby commanded to affix the seal of Relator to the Trust Agreement, which is authorized by the resolution of Relator which is set forth in Exhibit 1 of the Petition herein, and to attest the same, to affix the seal of the Ohio Turnpike Commission to the temporary bonds, provided for in

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said resolution, and attest the same and to deliver them to the Trustee, under said Trust Agreement, and later to affix said seal to additional temporary bonds and definitive bonds provided for in said resolution, and attest the same and deliver them to said Trustee when ready to be issued." (R., p. 3.)

This writ was served upon and received by affiant on July 9, 1952. (R., p. 2.)

4. As the effectiveness of said writ of mandamus from the Supreme Court of Ohio was not by its terms, nor by any other order of said court or of any judge of the court, nor by any order of the Supreme Court of the United States nor of any justice of the court, stayed or delayed, and as there was no order of any court, including the Court of Common Pleas, Lucas County, Ohio, to which the petition and record filed with the Supreme Court of the United States refer (R., pp. 239-247), restraining or enjoining affiant from proceeding to comply with the mandate of the Supreme Court of Ohio, affiant did, on July 9, 1952, affix the seal of the Ohio Turnpike Commission to the Trust Agreement involved in the above entitled cause and did on that date attest the same. Thereafter, prior to July 29, 1952, and pursuant to said mandate of the Supreme Court of Ohio, affiant affixed the seal of said Commission to and attested the same on the original 326 temporary bonds in the aggregate principal amount of $326,000,000 which are referred to in the petition and record in the above entitled cause and caused said temporary bonds to be delivered to the Trustee under said Trust Agreement for issuance to the 408 members of the underwriting group (herein called the "Purchasers") who had agreed to purchase the same under the Agreement of Purchase hereinafter mentioned. Also prior to July 29, 1952 and pursuant to said mandate of the Supreme Court

of Ohio, affiant affixed the seal of said Commission to and attested the same on approximately 250,000 additional temporary bonds in the aggregate principal amount of $326,000,000 in coupon and registered form in order to have them available for exchange for the original temporary bonds and caused such additional temporary bonds to be delivered to the Trustee under said Trust Agreement for such purpose. On July 29, 1952, the Trustee delivered to the purchasers the aforesaid original temporary bonds which were deliverable to them under the Agreement of Purchase, and said additional temporary bonds were on the same day duly exchanged for said original temporary bonds and such additional temporary bonds in coupon and registered form were sold and delivered by said purchasers to the public and widely distributed as is usual in a public sale and distribution of such an extremely large issue of securities. All of said transactions were effected pursuant to the Agreement of Purchase entered into June 4, 1952 and appearing in the petition and record in the above entitled cause at pages 34 to 39.

5. The fact that affiant was proceeding to affix the seal of said Commission to said temporary bonds received full publicity in advance of the delivery thereof. The fact that said bonds would be delivered and publicly distributed on July 29, 1952 was made known to the members of the underwriting group by official notice from the managers of the group before July 24, 1952 and the intention to effect delivery on July 29, 1952 as aforesaid was published on July 24, 1952 in The Daily Bond Buyer, the principal financial journal in the United States relating to municipal and governmental issues, and at or prior to that time, other and further publicity with respect to the signing of said bonds appeared in the Toledo Times, a newspaper of general circulation in Lucas County, Ohio, where the pe-

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titioners reside, the Columbus Citizen and Columbus Dispatch, newspapers of general circulation in Franklin County, Ohio, wherein the state capital and principal office of the Commission are located, and in the Cleveland Plain Dealer and Cincinnati Enquirer which, respectively, are published in the two largest cities in Ohio.

6. The Trustee under the aforesaid Trust Agreement has received the entire proceeds of said bond issue, substantial expenditures have in the normal course of business been made therefrom pursuant to the terms of said Trust Agreement and said Commission has in the normal course of business entered into commitments to numerous persons for payments from said proceeds in connection with the construction of the Turnpike and to the best of the knowledge and belief of affiant, all of the bonds have been distributed by the purchasers thereof to holders who have paid valuable consideration therefor.

Further affiant saith not.

ARCHIBALD J. ALLEN.

SWORN To before me and subscribed in my presence at Columbus, Franklin County, Ohio, this 7th day of October, A. D. 1952.

FRANK C. DUNBAR, JR.,
Frank C. Dunbar, Jr., *Notary Public.*
(Notarial Seal)